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IN THE

Supreme Court of the United States

October Term, 1964.

No. 324

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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No. ———.

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Local 1566, International Longshoremen's Association, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 30, 1964.

OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board, and Intermediate Report, printed in the Joint Appendix for use of the Court below, nine copies of which are filed herewith, are reported in 138 NLRB 737 (1962). The opinion of the United States Court of Appeals for the Third Circuit, printed as Appendix B hereto, is reported in 330 F. 2d 492. The Decree of the United States Court of Appeals for the Third Circuit is printed as Appendix C hereto.

JURISDICTION.

The Decree of the United States Court of Appeals for the Third Circuit was entered on April 30, 1964 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Where, in the longshore industry in the Port of Philadelphia, ILA sister Locals 1291 and 1566 work together in an integrated operation in loading and unloading the vessels, with Local 1566 preparing the vessel to receive cargo, and, as Local 1291 loaded and unloaded the cargo, Local 1566 secured it in the holds during loading and released it during unloading, and, where a substantial part of the work is done concurrently by both locals under a contract which gives both locals concurrent jurisdiction, and, where the employers locked out and refused to hire members of Local 1291 and thereby automatically cut off employment from members of Local 1566 and refused to hire members of Local 1566 although they were available and ready for work, did not such lockout discriminate against members of Local 1566 in the same manner as it discriminated against Local 1291 and should they not be awarded backpay as was awarded to members of Local 1291 to make them whole because of the wages lost as a direct consequence of the illegal lockout?

2. Where the Trial Examiner made findings of fact clearly supported by the evidence that the work of Locals 1566 and 1291 was an integrated operation, and that the lockout discriminated against both locals equally, did not the Court below err in refusing to award backpay to Local 1566 where backpay to Local 1291 men was allowed?

STATUTES INVOLVED.

The statutory provisions involved are the National Labor Relations Act, Sections 8(a)(1), 8(a)(3), 10(c), 502 (29 U. S. C. A. 158(a)(1), 158(a)(3), 160(c), 143).

STATEMENT OF THE CASE.

On June 30, 1959, 89 longshoremen, members of International Longshoremen's Association,[1] Local 1291, were assigned by Atlantic & Gulf Stevedores, Inc.[2] to unload a cargo of bagged sugar from the S/S "Caribe" at Philadelphia, by means of pallets, a dangerous method, instead of slings, the long-established and recognized safe method. The longshoremen refused to unload the sugar because of the danger involved, unless slings were substituted for the dangerous pallets (16a-17a, 54a-56a, 59a-60a, 99a, 133a-134a). Discussions and negotiations between ILA district and local union officials and representatives of A & G and Philadelphia Marine Trade Association,[3] the organization representing waterfront employers in the Port of Philadelphia, failed to persuade the employers to return to the prior customary safe method of unloading such cargo (17a-19a, 90a-91a, 103a-104a, 113a, 117a, 123a-124a). Instead, PMTA, acting for all the employers, rendered an ultimatum requiring the 89 men to unload the cargo with pallets or the entire port would be locked out to *all* longshoremen represented by Local 1291 (17a-18a, 19a, 62a, 367a-370a).

The 89 men, fearing for their personal safety, refused to undertake the unloading operation unless slings were used. The employer group then carried out its threat, and, on July 6, 1959, commenced its port-wide lockout. Although the lockout was expressly directed to Local 1291, the employer group, however, refused to hire members of Local 1566 also, with the exception of a few maintenance men for the protection of a plant at one of the piers, until July 22, 1959, when the dispute was finally resolved (20a, 70a, 71a).

Although the initial dispute in this case was between PMTA and Local 1291, the actual unlawful lockout from

1. Hereinafter referred to as "ILA".
2. Hereinafter referred to as "A & G".
3. Hereinafter referred to as "PMTA".

July 6 to July 22 also necessarily was operated to deprive members of petitioner Local 1566 of employment. Local 1291 is the deep-sea local, which does all the loading and unloading of ocean-going ships in the Port. The work of Local 1566 members is directly dependent upon and interrelated with that of Local 1291. Local 1566 members are ship carpenters, cleaners and maintenance men. They prepare the vessel for the receipt of cargo; they secure and shore-up cargo in the holds as it is loaded by Local 1291 men, and they dismantle the shoring in the unloading operation by that local. They work along with Local 1291 men from beginning to the end of the operation. In grain and similar bulk cargo ships, members of Local 1566, fit the ships with feeders and storage partitions, which Local 1291 men use to load such cargo. Concurrently, with members of Local 1291, they install dunnage flooring upon layers of cargo, discharge broken dunnage, lash and strap cargo, load shoring and flooring lumber, assist in loading ship's stores, and open and cover hatches (G. C. Ex. 9, pp. 55, 68-69).[4] Thus, there is a wholly integrated overlapping and mutually interdependent operation between members of Local 1291 and Local 1566. If Local 1291 is deprived of work, Local 1566 is at once and to the same extent deprived of work (21a, 23a, 95a).

Members of Local 1566, as Local 1291 members, reported for work each work day at regular hiring points, from July 6 through July 22 (130a). Out of *270* members of Local 1566 only *16 to 18* were hired for emergency purposes each day during the week of July 6, and only *four* men were hired during the week of July 13 (130a-131a, 207a). In this connection, and most significantly, Robert J. Hughes, the President of PMTA at the time, conceded "that when Local 1291 is locked out, most of the ships in the port are immobilized" (261a-262a). He further admitted that PMTA did not hire men between July 6 through July 22 (263a-264a).

4. "G. C. Ex." refers to General Counsel's exhibits in the record in this case.

Between July 6, and July 22, 1959, numerous meetings were held between the parties under the guidance of Commissioner Murray of the Federal Mediation and Conciliation Service (73a-74a). On July 21, 1959, when it had become obvious that PMTA did not intend to submit the issues to arbitration as required by the contract, *ILA* filed a Complaint in the United States District Court, praying the Court, inter alia, to order PMTA to end the lockout and to submit to arbitration in accordance with the contract (382a-388a). A hearing was set by the Court for the following day. Immediately after service of the Complaint the employers entered into joint sessions with the union, and an agreement was reached the same day to submit all issues to arbitration (20a, 74a-75a).

Judge Nochem S. Winnet was selected as the impartial arbitrator, whose decision on the question of safety in the method of discharging cargo would be binding on all parties (389a-390a). After carefully observing the discharging operation for several hours, Judge Winnet ruled that the method ordered used by the employer was, in fact, "not a safe operation" (395a), and directed that the cargo be unloaded with slings which he found to be a safe method of unloading the bagged sugar. The longshoremen thereupon completed the job in safety with slings, without incident (20a, 75a).

Charges having been filed by ILA, the NLRB, after the usual investigation, issued its Complaint against PMTA and its members, alleging lockout, coercion and discrimination, in violation of Sections 8(a)(1) and (3) of the Act. In the Fall of 1960, full hearings over an extended period were held before Trial Examiner Charles Whittemore. In his initial Intermediate Report, the Examiner found PMTA guilty of violating Sections 8(a)(1) and (3) as to all members of all the various ILA locals in the Port of Philadelphia, including the members of Locals 1291 and 1566, and recommended that the employers make whole all such employees, by payment of the sums they

would have received from July 6 to July 22, 1959, but for the lockout (13a 29a).

The Board remanded the case to the Examiner to develop additional testimony on several points. Nine more days of hearing were held, concluding in November, 1961. In his Supplemental Intermediate Report, the Trial Examiner reaffirmed his earlier conclusions and recommendations (29a-51a).

The Board sustained the Trial Examiner's findings that:

> 1. "The quitting of labor by the Caribe longshoremen was because of abnormally dangerous conditions for work, and . . . was not a strike."
>
> 2. "The Respondent's lockout of all the longshoremen in the Port because of this protected quitting of labor was discriminatory and a violation of Section 8(a)(3) and (1) of the Act." (7a-8a)

However, the Board reversed the Trial Examiner's finding that the lockout was discriminatory also against members of Local 1566, and set aside the award of backpay to the members of that local (8a).

The Court of Appeals affirmed the Board's decision, holding PMTA, the employer group, to be in violation of Sections 8(a)(1) and (3) of the Act and affirmed the backpay award to Local 1291 members, and affirmed also the denial of backpay to Local 1566 members on the ground that these employees were only "incidentally" affected by the lockout, and, therefore, not entitled to backpay.

Petitioner, Local 1566, herein seeks review of that part of the decision below holding that its members were not objects of the employers' discrimination and were not entitled to backpay. Said decision is in direct conflict with the decisions of this Court (1) holding the employer responsible for the natural and foreseeable consequences of its illegal acts, and (2) the Board should not overrule the trial examiner's findings except where the record clearly so demands.

REASONS FOR GRANTING THE WRIT.

I. The Illegal Lockout Constituted Unlawful Discrimination Against Members of Local 1566, Whose Work Was Integrated With and Wholly Dependent Upon the Work Performed by Local 1291; the Lockout Naturally and Foreseeably Deprived Members of Local 1566 of Employment, and the Employer Was Responsible for Such Consequences and Liable for Back Pay. The Decision of the Court Below to the Contrary Directly Conflicts With the Decision of This Court in *Radio Officers' Union v. NLRB*, 347 U. S. 17.

The interdependence of the work performed by Local 1566, with that performed by Local 1291 is too clear and too obvious to be denied with reason. The Trial Examiner, after hearing voluminous and detailed testimony and observing more than two dozen witnesses for both sides, found without hesitancy or question (23a):

> "Furthermore, the Trial Examiner finds merit in General Counsel's contention that ample evidence warrants the conclusion, here made, that the lockout of Local 1291 members resulted in equally unlawful discrimination against members of sister locals, since much of their employment depended upon longshoremen being employed. Such conduct affecting members of Locals 1332, 1566 and 1242 was likewise in violation of Section 8(a)(3) and (1) of the Act, and in support of this conclusion General Counsel properly cites Radio Officers Union v. NLRB, 347 U. S. 17, for the proposition that 'a person is held to intend the natural and foreseeable consequences of his conduct.'"

The work performed by members of Local 1566 is *especially* interrelated with that of Local 1291. The collective bargaining agreement between PMTA and ILA covering the Port of Philadelphia and effective at the time

in question (G. C. Ex. 9, p. 68), provides that members of Local 1566 perform the work of "carpenters, cargo repairmen and coopers . . . work done by marine carpenters and ceilers, including all carpentry aboard vessels and also all work done by coopers in connection with the loading and discharging of cargo. . . ." The agreement continues, defining the work of Local 1566 (G. C. Ex. 9, p. 68):

> "1. (a) As Carpenters: Build grain feeders, shoring of all cargo, including lashing and strapping of all cargo (chain wire or rope) including all wood work pertaining to the loading and unloading of all vessels and freight cars.
>
> "(b) As Cargo Repairmen and Coopers: Crating, re-crating cargo, stamping and marking cargo, bag sewing (paper or burlap), banding, strapping; wiring of cargo, packing and re-packing of cargo. . . ."

Indeed, with the loading and unloading halted, the work of securing and shoring cargo, and the unsecuring of same, of preparing ships for receipt of special cargo, such as grain and bulk materials, and installing fittings therefor, and of cleaning unloaded vessels, had also to come to a sudden halt. The duties of Local 1566 were and had to be exactly co-existent with those of 1291, since they were wholly and peculiarly complementary to each other. Most of the items of work performed throughout the working day by Local 1566 in connection with loading and unloading actually alternated with work being performed by Local 1291. For example, as Local 1291 longshoremen would lower cargo into the hold, 1566 men would secure and shore it, and the reverse operation would apply when cargo is unloaded. In certain bulk cargo ships, such as those carrying grain, the 1566 men fit the ship with "feeders" and shifting boards, which must be present in order for the 1291 men to load the cargo, and to keep it from moving and unbalancing the vessel. It would be difficult to conceive of any work operation more integrated between two categories of workers.

In addition, much of the work performed by Local 1566 actually overlaps that of Local 1291. In many aspects of the operation, their work is so entwined, that members of both locals have concurrent jurisdiction. Thus, the collective bargaining agreement between ILA and PMTA for the Port of Philadelphia, effective at the time in question (G. C. Ex. 9) provides (pp. 54-55, 68-69):

Ship Cleaners' Agreement (Local 1566)

* * *

"3. It Is Understood and Agreed that where ship cleaners—members of Local 1566, International Longshoremen's Association (Ind.) now enjoy work jurisdiction over certain types of work concurrently with members of other Locals of the International Longshoremen's Association (Ind.) in the Port of Philadelphia and vicinity, such work jurisdiction will remain unchanged. These include:

(a) Flooring off with dunnage—jurisdiction concurrent with longshoremen (Local 1291) and carpenters (Local 1566).

(b) Loading ship's stores, when not done by ship's crew—jurisdiction (of Local 1566) concurrent with longshoremen (Local 1291).

(c) Discharging broken dunnage—jurisdiction (Local 1566) concurrent with longshoremen (Local 1291).

(d) Opening and covering up hatches—jurisdiction (Local 1566) concurrent with longshoremen (Local 1291) and carpenters (Local 1566) (first in-last out rule)."

* * *

Carpenters' Agreement (Local 1566)
(Local 1566 includes both carpenters and shipcleaners.)

"2. It Is Understood and Agreed that where carpenters, cargo repairmen and coopers—members of Local 1566, International Longshoremen's Association (Independent)—now enjoy work jurisdiction over certain types of work concurrently with members of other locals of the International Longshoremen's Association (Independent) in the Port of Philadelphia and vicinity, such work jurisdiction will remain unchanged. These include:

(a) Flooring off with dunnage—jurisdiction (Local 1566) concurrent with longshoremen (Local 1291) and cleaners (Local 1566).

(b) Lashing and strapping cargo—jurisdiction (Local 1566) concurrent with longshoremen (Local 1291).

(c) Loading, shoring and flooring lumber—jurisdiction (Local 1566) concurrent with longshoremen (Local 1291).

(d) Opening and covering up hatches—jurisdiction (Local 1566) concurrent with longshoremen (Local 1291) and cleaners (Local 1566) (first in-last out rule).

(f) Carpenters (Local 1566) may perform the little incidental movements of cargo to effectuate shoring."

The employers, obviously are at all times aware of this interdependence of work, and the broad-reaching effect that refusing to hire any one category of worker must have upon the others—especially when this category is the loader and unloader of ships.

Mr. Hughes, President of the employer association, quite unwillingly admitted (261a-262a) that because the

Local 1291 men refused to work under dangerous conditions, the PMTA locked out the entire Port of Philadelphia, "freezing" all ships, and refusing to hire any waterfront worker in any of the locals involved. During the period of the lockout, the members of Local 1566 shaped up and were available for work (128a-133a). They were not employed and the lockout directly deprived them of employment. The Trial Examiner's finding that the lockout discriminated against Local 1291 and deprived its members of employment is overwhelmingly supported by the evidence.

The employers' ultimatum, held illegal by the Trial Examiner and by the Board and by the Court below, was clearly designed to force all other ILA employees in the Port to bring pressure upon those longshoremen assigned to the "Caribe" to unload that vessel under an abnormally dangerous method of operation. This was a case wherein a few gangs of longshoremen were forced to leave a particular job aboard a particular ship because of the unduly hazardous nature of the work aboard that vessel. At the time of the walkout, longshore operations were going on along the entire waterfront. In fact, there was not even a strike against A & G, the employer involved. The dispute was limited in scope to the working conditions aboard the "Caribe". Under these circumstances, it is clear that a lockout by all employers along the waterfront was a coercive measure designed to combat the lawful activities of the employees and to coerce all waterfront workers, including members of Local 1566, to force the men on the "Caribe" to accept unduly hazardous working conditions. See *Anchorage Businessmen's Assn.*, 124 NLRB 662, 668-69, enfd. 289 F. 2d 619 (9 Cir., 1961).

Despite the strong evidence of discrimination against Local 1566, the Court below, concurring with the Board in reversing the Trial Examiner, held that "there is no evidence of any discriminatory motivation toward employees other than longshoremen (Local 1291)" that the "conse-

quential injury to the other workers 'occurred because of the nature of their work, not by virtue of their membership in any union' ". This conclusion is in direct conflict with the principles announced by this Court in *Radio Officers' Union v. NLRB*, 347 U. S. 17, 98 L. ed. 455 (1954). That case wholly supports the decision of the Trial Examiner, and strikes down as unrealistic, inequitable, and in violation of the spirit of the Act, the decisions of the Board and the Court of Appeals, in this matter.

In the *Radio Officers'* case, the issue was a violation of Sec. 8(a)(3)—that the employer encouraged or discouraged union membership by means of discrimination. This Court said that it is clear "that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of 8(a)(3)", that

> ". . . This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct. . . . Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. *Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.* In such circumstances intent to encourage is sufficiently established. . . ." (U. S. at 45, L. ed. at 479-80) [5]

This principle was expanded in *NLRB v. Erie Resistor Corp.*, 341 U. S. 810, 10 L. ed. 2d 308, 314-15 (1963), wherein this Court held that specific evidence of subjective intent to discriminate is *not* necessary; that this intent may lie

5. This Court there noted that in *Republic Aviation Corp. v. NLRB*, 324 U. S. 793, 89 L. Ed. 1372, it held that it did not matter that an employer's rules were not specifically intended to discourage union membership—since such discouragement was the *foreseeable result*, the rule was discriminatory.

in the "very nature" of the conduct, *or* in the natural foreseeable consequences which warrant the inference.

Similarly, in *NLRB v. Electric Steam Radiator Corp.*, (6 Cir., 1963) 321 F. 2d 733, Judge Shackleford Miller said, at 737:

> "Motivation of the employer in such discrimination is the important factor. But, it is also clear that specific evidence of intent to encourage or discourage is not an indispensible element of proof of violation of Section 8(a)(3). Proof of certain types of discrimination satisfies the intent requirement. Where the employer's conduct is such that it inherently encourages or discourages union membership, intent is sufficiently established. An employer's protestation that he did not intend to encourage or discourage union membership is unavailable where *a natural consequence of his action* was such encouragement or discouragement. . . ." (Emphasis supplied.)

The Court also pointed out, in that case, that the antiunion motivation need not be the *only* reason for the discriminatory action complained of. It need only be a substantial reason therefor, and the existence of other reasons does not detract from its violative nature (738).

In *Western Contracting Corp. v. NLRB*, (10 Cir., 1963) 322 F. 2d 893, the Court said, at 901:

> "As to the violation of Section 8(a)(3), supra, petitioner maintains that there is a dearth of evidence to establish that its motivation was to discourage membership in any labor organization. However, specific intent does not appear to be a necessary element.[6] Thus, where the natural and probable consequences of the action of the employer is to discourage union membership, the employer will not be heard to say that he entertained no such intent or motive. Consistent with our findings that the employees were engaged in valid

6. Citing *Radio Officers v. NLRB.*

union activity, it follows that the efforts of petitioner having a natural tendency to discourage union membership, constitute a violation of Section 8(a)(3)."

The same reasoning was adopted in *NLRB v. Merchants Police, Inc.*, (7 Cir., 1963) 313 F. 2d 310, 312-13, where the Court held that where the employer's conduct causes an employee to suffer adversely, specific evidence of intent is not an indispensable element to prove an 8(a)(3) violation, and the employer's protestation otherwise is unavailing. The Court also pointed out, at 313, that the defensive contentions made by the employer must be viewed against the setting and facts in which the activities have taken place.

In the instant case, we have, in the first instance, the clear undisputed proof that the employers *refused to hire* the men from Local 1566, and thus effectively locked them out. Second, this obviously broad and all-inclusive coercion is set against the background of the complete dependence of Local 1566 jobs upon the work which must be performed by members of Local 1291. As loading and unloading of cargo ceased, so, necessarily, did securing and unsecuring that cargo cease. The conclusion is incontrovertible.

The natural and foreseeable consequence of this lockout "of Local 1291" was *and necessarily had to be* a deprivation to Local 1566. Their interrelation and interdependence were no secret from the employers. Here, we have two local unions, which are part of a single International, which have historically bargained together with PMTA, and which have been and were at the time in question, joint parties to the same collective bargaining agreement (377a). Not only has their respective employment been mutually dependent, but their very crafts require each other for their own existence. When the dispute arose involving directly one of these locals, an International Vice-President (Mr. Moock) handled attempts to settle the matter, together with local officials. In effect, the locals, of necessity have existed, bargained, contracted, worked and been out of work together. They were not merely local unions whose sole con-

nection was the economic bond between different trades working side by side on a project. Their relation and interdependence were organic, as well. While the retaliatory lockout was *ostensibly* imposed against only Local 1291, it simultaneously attacked and pressured and refused to give employment to the other, whose interests and activities were so intimately bound to it.

The lockout was aimed at *ILA*, in order *to force concessions from ILA*, the employers realizing that these locals were so historically, practically and officially as well as economically, interrelated. The pain suffered by one local was referred at once to the other. These concessions could take the form of: (1) pressure by Local 1566 to convince Local 1291 to give in to PMTA's improper demand; (2) pressure by the International for the same purpose. This picture is too clear to be denied. True, the threat of lockout carefully mentioned only Local 1291, but this was all that was necessary to complete the threat against the members of Local 1566, who work with 1291 men. There was no doubt about the consequences that would take place. As stated in the *Erie Resistor* case, the employer "must be held to intend the very consequences which foreseeably and inescapably flow from his actions," for, "his conduct *does* speak for itself" (10 L. ed. 2d at 314-15). These consequences penalized the union for performing protected activity (29 U. S. C. A. 143), and interfered with, restrained and coerced employees in the exercise of their right to engage in "concerted activities for . . . mutual . . . protection" (29 U. S. C. A. 157, 158(a)(1)). It was a tort, and by the instruction of this Court, the tortfeasor was bound by the natural and foreseeable consequences thereof.

The Trial Examiner was thus fully justified in finding "equally unlawful discrimination against members of Local 1566, since their employment depended upon longshoremen being employed" (23a). The contrary conclusion of the Board and the Court below, reversing the Trial Examiner, was in direct conflict with the principles announced by this Court and should be reversed.

II. The Board and the Court Below Improperly Overruled the Findings of Fact Made by the Trial Examiner, Which Were Wholly Supported by Evidence Which Was Substantial and, in Significant Part, Undisputed. This Was in Direct Conflict With the Instruction by This Court, in *Universal Camera Corp. v. NLRB*, 340 U. S. 474.

Despite the clear and specific findings of fact made by the Trial Examiner, based upon factual situations which occurred in this case, as *fully and undisputedly described* by the many witnesses, including *admissions* made by the President of PMTA, the Board and the Court below improperly refused to accept and apply these findings. The Board achieved this by stating that the "complaint does not allege that members of these sister locals . . . were also locked out . . ., nor does the evidence . . . lead us to this conclusion" (8a). The Court below adopted this statement and, further, said that "the Board's reversal of the Trial Examiner was based on an issue of law rather than a question of fact" (330 F. 2d, at 495, 496). The Court below then concluded that "the record does not reveal an intent to discriminate against the members of the sister locals . . . only incidentally did it affect the other workers in the Port of Philadelphia" (330 F. 2d at 496). We respectfully submit that the Court's and the Board's refusal to accept the well-substantiated fact findings of the Trial Examiner, and the Court's converting such findings into conclusions of law clearly violated the instructions of this Court in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 95 L. ed. 456 (1951).

In the *Universal Camera* case, the appellant contended that the Court of Appeals erred in refusing to consider the report of the Trial Examiner on questions of fact, insofar as that report was rejected by the Board. This Court held that the Court of Appeals did err (U. S. at 491-92, L. ed. at 469-70). After discussing the similarity

between the National Labor Relations Act and the Administrative Procedure Act, 5 U. S. C. A. 1001, et seq. and the requirement that the reviewing Court "determine the substantiality of evidence on the record including the examiner's report", this Court said (U. S. at 493-94, L. ed. at 470):

> ". . . The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.
>
> "This aim was set forth by the Attorney General's Committee on Administrative Procedure:
>
> > 'In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.' "

This Court observed that the bill which finally emerged, and the Administrative Procedure Act, moderated this somewhat, but stated that (U. S. at 495, L. ed. at 471):

> "But this refusal to make mandatory the recommendations of the Attorney General's Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the *examiner's opportunity to observe the witnesses he hears and sees and the Board does not.* Nothing suggests that reviewing courts should not give to the examiner's report such

probative force as it intrinsically commands. To the contrary, § 11 of the Administrative Act contains detailed provisions designated to maintain high standards of independence and competence in examiners. Section 10(c) of the Labor Management Relations Act requires that examiners 'shall issue . . . a proposed report, together with a recommended order.' Both statutes thus evince *a purpose to increase the importance of the role of examiners in the administrative process.* High standards of public administration counsel that we attribute to the Labor Board's examiners both due regard for the responsibility which Congress imposes on them and the competence to discharge it." (Emphasis supplied).

After emphasizing the legislative committee's declaration of the unique position occupied by the Trial Examiner, especially where credibility is involved, Mr. Justice Frankfurter concluded (U. S. at 496-97, L. ed. at 472):

"We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. *The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree.* We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.'

> "The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything 'logically probative of some matter requiring to be proved.' . . . It would reverse this process for courts to deny examiners' findings the probative force they would have in the conduct of affairs outside a courtroom."

This Court then remanded the case to the Court of Appeals with instructions to "accord the findings of the Trial Examiner the relevance that they reasonably command" (U. S. at 497, L. ed. at 472).

In the instant case, the Court of Appeals, as well as the Board "misapprehended and grossly misapplied" the standard set by this Court.[7] Not only did they not recognize the special position occupied by the Trial Examiner in making findings where credibility was significant, but they wholly ignored findings based upon testimony which was *undisputed*, and which was *admitted* by witnesses for the employers. Although the Trial Examiner's findings were based upon *more than substantial evidence*, the Board and the Court below just *ignored* them or assigned them to the category of "conclusions of law." This method of decision denied to the Trial Examiner's findings the force and effect allocated to them by the Act, as interpreted by this Court.

As a prelude to its disposal of the Trial Examiner's findings of fact, the Board and the Court below stated that the "complaint does not allege" lockout of the sister local. This was clearly without basis on the face of this record. The amended complaint alleges as follows:

> "6(d) On or about July 6, 1959, Respondents, and each of them, did engage in and did enforce within the confines of the Port of Philadelphia, as heretofore de-

7. Cf. *Universal Camera* case, U. S. at 491, L. ed. at 469.

scribed and defined, a concerted and individual lockout and refusal to give and make work available to members of Local 1291, ILA.

(c) The effect of Respondents' conduct described in paragraph 6(d) above, was to deny to and withdraw and withhold work and work opportunities from, members of Locals 1332, 1566, and 1242, ILA.

7(a) Respondents' refusal to give work to the members of Local 1291, ILA, described in paragraph 6(d) above, and the consequent denial of work opportunities to members of Locals 1332, 1566, and 1242, ILA, continued at all times between July 6, 1959, and July 23, 1959.

(b) The effect of Respondents' refusal to provide work for the members of Local 1291, ILA, as described in paragraphs 6(d) and 7(a) above, and the effect of the consequent denial of work opportunities to members of Locals 1332, 1566, and 1242, ILA, as described in paragraph 6(e) and 7(a) above, was to bring maritime operations within the Port of Philadelphia to a halt, thereby causing loss of employment, employment opportunities and earnings to the members of Locals 1291, 1332, 1566, and 1242, ILA." (359a-360a)

Clearer allegation of lockout of all four locals could not be expressed. These allegations, and the testimony supporting them, deprive the Board's reversal of all basis. These issues were understood by all parties to exist, and were fully litigated in extensive adversary proceedings in which all parties participated.

More significantly, and in complete discord with the instructions of this Court, the Board and the Court below simply ignored the Trial Examiner's findings, and reversed them as conclusions of law (330 F. 2d at 496). No effort was made to discuss the substantiality of the evidence, the questions of credibility, the admissions by the employers' witnesses and the undisputed testimony of clear discrimination and active refusal to hire members of

Local 1566. As this Court has held, neither the Board nor the Court of Appeals may thus sweep under the rug the findings made by the Trial Examiner.

The Trial Examiner found that the "work of members of these various ILA locals is interrelated"; that when longshoremen are not employed in loading and unloading, the other waterfront workers are unemployed too (21a); that members of these three other locals "shaped up" for work during the lockout, but none (except a few) were hired (21a); that the lockout of Local 1291 discriminated against members of the sister locals, whose employment was interdependent; that the employer knew of this dependency; and that such discrimination was a natural and foreseeable consequence of the lockout (23a). It is wholly inconceivable how the Board could decide that these findings were other than findings of fact. To label them conclusions of law flies in the face of their very meaning. And, worse, no effort was made to discuss or negate them in any way. Indeed, in view of the evidence, such efforts would have had to prove futile. The next step, after discussing these findings would be, of course, the *legal* effect of the fact that this discrimination against Petitioner was the natural and foreseeable consequence of the lockout. This, then, reverted into the realm of legal conclusions. And, on this point, it is clear that the employers were responsible for such consequences as discussed in the preceding section hereof.

Further, it is clear that the findings of fact are overwhelmingly supported by testimony, much of which is undisputed. The interdependence of work was clearly described by Mr. Moock (94a-96a). Mr. Hughes admitted that when PMTA locks out 1291, "we freeze all of the ships on which ILA do the stevedoring" (261a), and that the port is thus "immobilized" (262a). The refusal to hire members of Local 1566, despite their daily shape-up, as found by the Trial Examiner, is also clear from the testimony (130a-132a), discussed in the preceding section, including the specific admission by Mr. Hughes, then President of

PMTA. The latter admitted that the telegrams sent by PMTA threatening not to hire Local 1291 men (367a-368a, 369a-370a) meant that PMTA would not hire *any* men for "all ships in the port on which 1291 men are used" (261a); that, in fact, *PMTA did not hire at all* during the lockout (264a). Thus, Mr. Hughes admitted that the lockout was immediately directed against all ILA Locals whose *only* work was in connection with such ships, as well as 1291. He also thereby admitted that the PMTA telegram prohibited hiring, not of Local 1291 men, but of men for "all ships" in the port on which 1291 men would normally work. This meant every ship in the port which required loading or unloading. Further, the admitted fact was that PMTA just *did not hire*. This testimony, confirmed by that of the representatives of the four local unions, makes it clear that the lockout and refusal to hire was directed against all of the locals.

The Trial Examiner stated:

> "In the opinion of the Trial Examiner, the preponderance of credible evidence fully sustains General Counsel's allegations of unfair labor practices as to all Respondents except Northern Metal." (22a)
>
> * * *
>
> "Furthermore, the Trial Examiner finds merit in General Counsel's contention that ample evidence warrants the conclusion, here made, that the lockout of Local 1291 members resulted in equally unlawful discrimination against members of sister locals, since much of their employment depended upon longshoremen being employed. Such conduct affecting members of Locals 1332, 1566, and 1242 was likewise in violation of Section 8(a)(3) and (1) of the Act, . . ." (23a)

The Board, in stating that the evidence adduced at the hearings did not lead it to the conclusion that members of the other locals were also locked out, completely by-passed and reversed the Trial Examiner's findings of fact. This was beyond the power of the Board.

It is *not*, as the Board and the Court below contend, a reversal of a "legal conclusion". Since there was ample testimony to support the Trial Examiner's finding, it must stand, and all testimony contrary thereto must be deemed to have been disbelieved. *NLRB v. Sheboygan Chair Co.*, (7 Cir. 1942) 125 F. 2d 436; *NLRB v. Steel and Hardware Warehousemen*, (2 Cir. 1960) 274 F. 2d 688. What the Board did, without articulating its analysis or standards, was substitute its judgment on credibility, based on the cold record, for the Trial Examiner's judgment based on his personal observation of the witnesses and their demeanor. This was notwithstanding that the preponderance of the evidence supports the Trial Examiner's determination. Neither the Board nor the Court below was justified in making this substitution of judgment under these circumstances.

The findings of fact by the Trial Examiner, substantiated by a preponderance of the evidence, necessitate the conclusion that Local 1566 was locked out, upon two independent bases: 1. PMTA actively refused to hire its members, although they reported for work daily through the period of the lockout; 2. the lockout "of Local 1291" was simultaneously a lockout of Local 1566 members since it *necessarily and foreseeably* had to deprive them of work.

The Board has, in the past, expressed a policy which *was* in conformity with the *Universal Camera* doctrine, and has followed a policy "not to overrule a Trial Examiner's resolutions as to credibility, except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner's resolution was incorrect." *American Life & Accident Ins. Co.*, 123 NLRB 529, 531 (1959). The reversal of the Examiner in the instant case is all the more puzzling because it is not explained, and, further, because it necessarily ignores the overwhelming preponderance of the evidence. If the facts found by the Trial Examiner are to be given *any* effect, if the Act is to be applied as interpreted by this Court, the Trial Examiner's conclusions

must stand. Otherwise, we can only assume that the Court below and the Board have ignored all of the facts found by the Trial Examiner, which, under the present circumstances, they may not legally do.

Because substantial evidence on the record as a whole demonstrates that PMTA unlawfully deprived members of Local 1566, in addition to the longshoremen represented by Local 1291, of employment opportunities for the period of July 6 to July 22, 1959, the Court below should have reinstated the findings of the Trial Examiner and ordered that PMTA make whole the members of Local 1566 for the pay they lost between July 6 and July 22, 1959.

The Court below stated that there is no evidence of any discriminatory motivation toward other than members of Local 1291, that in absence of such evidence, the employers' action was not unlawful unless "inherently discriminatory," citing *NLRB v. Erie Resistor Corp.*, 373 U. S. 221, 10 L. ed. 2d 308 (1963) (330 F. 2d at 496). But the *Erie* case, specifically following *Radio Officers v. NLRB*, held, that specific evidence of illegal intent is *not necessary* to a finding of discrimination. This Court said (U. S. at 227, L. ed. at 314):

> ". . . Cases in this Court dealing with unfair labor practices have recognized the relevance and importance of showing the employer's intent or motive to discriminate or to interfere with union rights. *But specific evidence of such subjective intent is 'not an indispensible element of proof of violation.'* 'Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. . . .'" (Emphasis supplied.)

After discussing the effect of specific evidence of intent to discriminate, this Court continued (U. S. at 228-29, L. ed. at 314-15):

> "The outcome may well be the same when intent is founded upon the inherently discriminatory or destruc-

> tive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate to or invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. . . ."

Thus, any requirement that the employers' actions be "inherently discriminatory" is satisfied where "the very consequences" of their actions were foreseeable. As this Court said: *the employers' actions do speak for themselves.* In the instant case, then, the test put by the Court below was fully satisfied by the overwhelming weight of the facts presented in the evidence and found by the Trial Examiner.

The Court below attempts, also, to put the discrimination against Local 1566 in the nature of "incidental" (330 F. 2d 496). But, as stated by this Court in the *Erie Resistor* case, the test is the existence of "unavoidable consequences" which the employer *must* have foreseen. The fact that the employer can point to some other object does *not* make *this* discrimination "incidental". When one fires a shot-gun, he is held responsible for the effect of *every* pellet, not merely the one he says he had in mind. Locking out the Port of Philadelphia, in view of the circumstances here, carried with it the *unavoidable* consequence of depriving *every* waterfront worker of an opportunity to earn a living. For all of this, the employers are responsible.

CONCLUSION.

The opinion and decree below conflict materially with the decisions of this Court on two important questions which have significant effect upon the operation of the National Labor Relations Act. Therefore, it is respectfully requested that a Writ of Certiorari be granted so that these matters may be reviewed by this Court.

Respectfully submitted,

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APPENDIX A.

National Labor Relations Act.

* * *

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A)

if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

§ 160. Prevention of unfair labor practices—(a) Powers of Board generally

* * *

REDUCTION OF TESTIMONY TO WRITING; FINDINGS AND ORDERS OF BOARD

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization af-

fected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

• • •

§ 143. Saving provisions

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter. June 23, 1947, 3:17 p. m., E. D. T., c. 120, Title V, § 502, 61 Stat. 162.

APPENDIX B.

PHILADELPHIA MARINE TRADE ASSOCIATION AND ITS MEMBERS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Local 1291, ILA, Intervenor.

Local 1332, ILA, Intervenor.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCALS 1291, 1332, 1566 AND 1242,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Philadelphia Marine Trade Association and Its Members, Intervenors.

Nos. 14257 and 14225.

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT.

Argued Nov. 4, 1963.

Decided April 6, 1964.

Before STALEY, HASTIE and SMITH, *Circuit Judges.*

STALEY, *Circuit Judge.*

The National Labor Relations Board has found that the employer-members of the Philadelphia Marine Trade

Association ("PMTA") violated § 8(a)(3) and (1) of the National Labor Relations Act.[1] More specifically, the Board determined that these employers wrongfully locked out all of the longshoremen employed by them in the Port of Philadelphia because certain of those longshoremen properly refused to work under conditions found to be unsafe. 138 N. L. R. B. 737 (1962). The case is here on petitions for review filed by the PMTA and by the International Longshoremen's Association, Locals 1291, 1332, 1566, and 1242. The Board has requested enforcement of its order in its answer to the petition of the PMTA. The PMTA asserts that the Board's determination is unwarranted, while the union contends that the Board should have found additional violations and that its back pay award is inadequate.

The dispute which gave rise to the instant proceeding was based upon the insistence by one of the employer-members of the PMTA, Atlantic and Gulf Stevedores, Inc., that the longshoremen employed by it use wooden pallets instead of slings to unload a cargo of sugar on the S. S. Caribe. Perhaps the most concise statement of the factual circumstances attending this controversy is contained in the following excerpt from the decision of the Board:

> "As the Trial Examiner found, on June 30, 1959, some 90 A & G employees, longshoremen members of Local 1291, reported to the S S. Caribe to unload a full cargo of bagged sugar. Upon arrival, they learned that they were to unload the bags with the use of pallets rather than slings. They notified their union representatives that they would not unload with pallets

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1. "§ 158. Unfair labor practices

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *." 29 U. S. C. A. § 158(a)(1) and (3).

as they considered such an operation unsafe. The representatives communicated the longshoremen's decision to Emery, the pier supervisor of A & G, and a compromise proposal was offered by Emery whereby the longshoremen would unload the ship with slings and then use pallets for rehandling the bags on the dock. By the time Local 1291 accepted, however, the proposal was abruptly withdrawn by William Toner, District Manager of A & G, who made his appearance while the Union representatives were conferring among themselves. The longshoremen then left the ship, and worked neither that day nor the following day, July 1. After several conferences between officials of ILA, A & G, and PMTA, an employers' association of which A & G was a member, an agreement was reached between Toner and J. T. Moock, a vice-president of ILA, whereby the men would start unloading with pallets and a changeover to slings would be made shortly thereafter.

"At 8 a.m. on July 2, the A & G longshoremen began unloading with the use of pallets. It is clear, as the Trial Examiner found, that bags of sugar fell from the pallets during the unloading operation. And Toner admitted that even one falling bag was dangerous. When a shift to slings was not made by A & G during the morning despite the complaints of the longshoremen, they refused to return to work after lunch. The Respondents thereupon advised ILA by telegram that unless the A & G longshoremen resumed work on the Caribe at 8 a.m. on July 3, all longshoremen represented by Local 1291 would be locked out throughout the entire Port of Philadelphia commencing July 6. At 8 a.m. on July 3, however, A & G still had not shifted to slings, and the Caribe longshoremen accordingly continued to refuse to work. At noon all the other longshoremen members of Local 1291 in the Port of

Philadelphia area stopped work to meet at the union hall for a discussion of the lockout threatened by the Respondents. They were directed by ILA officials to report for work as usual on July 6. When they did, however, the Respondents carried out their threat and locked them out. Moreover, the Respondents insisted that the lockout would not be lifted until the A & G longshoremen resumed work under the unsafe conditions which had caused them to cease work in the first place. The Respondent further refused to consider the safety question under the grievance and arbitration provisions of the contract until the longshoremen resumed work on the Caribe. On July 21, however, the Respondents finally receded from their position, agreed to end the lockout, and likewise agreed to arbitrate the safety question. On the following day, the arbitrator observed the operation of unloading the bagged sugar from the Caribe with the use of pallets, and found it to be an unsafe operation. Thereupon, A & G substituted slings, and the A & G longshoremen completed their work of unloading the Caribe, without further incident."

The Board held that, as the longshoremen's refusal to work resulted from an abnormally dangerous condition of work, this refusal did not constitute a strike under § 502 of the Act,[2] even assuming the existence of a no-strike contract. Accordingly, this quitting of labor was held to be protected by the Act, and the lockout was found to be in violation of § 8(a)(3) and (1). Back pay was awarded to all longshoremen, including those who had refused to work

2. "§ 143. Saving provisions

"Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, * * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." 29 U. S. C. A. § 143.

on the S. S. Caribe, from the date of the lockout on July 6, 1959, until July 22, 1959. However, the Board, reversing the trial examiner, concluded that, in the circumstances of this case, the employers did not discriminate against the members of sister unions who did not work during the period of the lockout and who were normally employed as maintenance men, timekeepers, checkers, or carloaders in the Port of Philadelphia.

[1] The PMTA does not seriously challenge the Board's finding that the work stoppage was caused by an abnormally dangerous condition of work. See National Labor Relations Board v. Knight Morley Corp., 251 F. 2d 753 (C. A. 6, 1957), cert. denied, 357 U. S. 927, 78 S. Ct. 1372, 2 L. Ed. 2d 1370 (1958). The Association argues, however, that the lockout was justified because its purpose was to compel the union to abandon a "quickie strike," and to compel the submission of the dispute to arbitration. The short answer to this is that because the union's activity was found to come within the ambit of § 502, it was not a strike in violation of the contract but, on the contrary, was protected activity. In these circumstances, the Board properly concluded that the lockout by the PMTA in an attempt to compel the longshoremen to abandon this protected activity gave rise to a violation of § 8(a)(3) and (1). See, Utah Plumbing and Heating Contractors Assn. v. National Labor Relations Board, 294 F. 2d 165 (C. A. 10, 1961); Quaker State Oil Refining Corp. v. National Labor Relations Board, 270 F. 2d 40 (C. A. 3), cert. denied, 361 U. S. 917, 80 S. Ct. 261, 4 L. Ed. 2d 185 (1959); National Labor Relations Board v. Knight Morley Corp., supra (discharge for refusal to work under abnormally dangerous conditions). Moreover, the Board, based upon substantial evidence, found that it was the PMTA and not the union which delayed arbitration by its insistence that the employees continue to work pending a resolution of the issue. Thus, to the extent that the challenge of the PMTA to the finding of an unfair labor

practice constitutes an attack upon the Board's findings of fact, including both the inferences it drew from the evidence presented as well as its resolution of issues of credibility, we have repeatedly stated that such factual determinations will not be disturbed by this court unless not supported by substantial evidence in the record as a whole. National Labor Relations Board v. Chas. S. Wood & Co., 309 F. 2d 140 (C. A. 3, 1962); National Labor Relations Board v. Buitoni Foods Corp., 298 F. 2d 169 (C. A. 3, 1962); Quaker State Oil Refining Corp. v. National Labor Relations Board, supra. Here the findings of the Board are amply supported by the evidence.[3]

The reliance by the PMTA upon the decision in National Labor Relations Board v. Truck Drivers' Local Union No. 449 etc., 353 U. S. 87, 77 S. Ct. 643, 1 L. Ed. 2d 676 (1957), as justification for the lockout is misplaced. The Supreme Court there held that a lockout by an association of employers is not unlawful when used as a defense to a union's "whipsawing" strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis. See also New York Mailers' Union Number Six, International Typographical Union, A. F. L. - C. I. O. v. National Labor Relations Board, 327 F. 2d 292 (C. A. 2, 1964). Here the lockout was a countermeasure not to a strike, but to a refusal to work under abnormally dangerous conditions. Nor was this conduct of the longshoremen a threat to bargaining on a group basis.

Local 1332 of the International Longshoremen's Association has been granted leave to intervene in each of these petitions for review. Both it and the other union parties to this proceeding vigorously attack the failure of the Board to find a violation with respect to employees other

3. The same observations apply to the contention that the employers were not informed that the quitting of labor resulted from abnormally dangerous conditions of work, and that they were not given a reasonable opportunity to correct these conditions.

than longshoremen who were affected by the lockout. Because of its significance, we quote the holding of the Board on this score:

> "We do not agree, however, with the Trial Examiner's further conclusion that the lockout of the longshoremen also constituted unlawful discrimination against members of sister locals normally employed by Respondents as maintenance men or timekeepers or checkers or carloaders. The complaint does not allege that members of these sister locals (specifically, Locals 1332, 1566 and 1242) were also locked out by Respondents, nor does the evidence adduced at the hearing lead us to this conclusion. Accordingly, we find, in the circumstances of this case, that the Respondents did not discriminate against the other categories of employees represented by Locals 1332, 1566, and 1242."

[2] The unions argue that this holding constitutes an unwaranted reversal by the Board of the factual finding of the trial examiner that these employees were deprived of an opportunity to work by the lockout. Further, the unions contend that the Board was compelled to find a violation as to these employees because their work "was interrelated with and wholly dependent upon the work performed by [the longshoremen]."

The Board concedes that these employees lost work as a consequence of the lockout. It urges that its reversal of the trial examiner on this point was not based on a contrary view of the facts, but upon its view of the legal effect of the facts he found. More particularly, the Board contends that the loss of work by employees other than longshoremen did not result from any discriminatory action by the PMTA against them, but was simply an incidental consequence of the discriminatory action taken against the longshoremen.

We think that the Board's reversal of the trial examiner was based on an issue of law rather than a question of

fact. Though at first glance the language in its decision appears to indicate a different view of the evidence, actually the Board was reversing the trial examiner's legal conclusion that "the lockout of Local 1291 members resulted in equally unlawful discrimination against members of sister locals, since much of their employment depended upon longshoremen being employed."

If is not controverted that the PMTA had no dispute with the members of the sister locals; its dispute was with the longshoremen because of their refusal to work under conditions found to be dangerous. To put the matter another way, there is no evidence of any discriminatory motivation toward employees other than longshoremen. As the Board aptly observes in its brief, the consequential injury to the other workers "occurred because of the nature of their work, not by virtue of their membership in any union." In the absence of any evidence of discriminatory intent, the employers' action was not unlawful as to these employees, unless it was "inherently discriminatory." National Labor Relations Board v. Erie Resistor Corp., 373 U. S. 221, 83 S. Ct. 1139, 10 L. Ed. 2d 308 (1963). We have already stated that the record does not reveal an intent to discriminate against the members of the sister locals, and we cannot say that the lockout was inherently discriminatory as to them in the circumstances of this case. In sum, the conduct of the employers was directed against the longshoremen, and only incidentally did it affect the other workers in the Port of Philadelphia.

Our recent decision in National Labor Relations Board v. Local 825, International Union of Operating Engineers, A. F. L. - C. I. O., 326 F. 2d 218 (C. A. 3, 1964), supports our conclusion on this point. We there ruled that union conduct which only incidentally affects a neutral employer cannot be held to violate the secondary boycott provisions of the Act.

[3] Local 1291 asserts that the back pay award to the longshoremen who refused to work on the S. S. Caribe

should run from the date of their refusal to work rather than from the date of the lockout. The Board contends that the award is proper since the unfair labor practice did not occur until the PMTA instituted the lockout. We think that the rationale of the Board is sound, for though the longshoremen were protected by the statute in refusing to work under abnormally dangerous conditions, no unfair labor practice arose until they were locked out by their employer. In any event, we cannot say that the Board abused the broad discretion vested in it to fashion remedial back pay orders to effectuate the policies of the Act.

The order of the Board will be enforced. A form of decree may be submitted.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

PHILADELPHIA MARINE TRADE ASSOCIATION and Its Members, Listed in Appendix A Attached Hereto,
Petitioners.
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 14225.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCALS 1291, 1332, 1566 AND 1242,
Petitioners.
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. 14257.

DECREE.

Before: STALEY, HASTIE and SMITH, *Circuit Judges.*

THIS CAUSE came on to be heard upon the petition of Philadelphia Marine Trade Association and its Members, to review and set aside an order of the National Labor Relations Board dated September 21, 1962, directed against said petitioners (No. 14225), their officers, agents, suc-

cessors, and assigns and upon the Board's answer and cross-petition to enforce its order and upon the petition of International Longshoremen's Association Locals 1291, 1332, 1566 and 1242 (No. 14257), to review the same Board's order. The Court heard argument of respective counsel on November 4, 1963, and has considered the briefs and transcript of record filed in this cause. On April 6, 1964, the Court, being fully advised in the premises handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Third Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Philadelphia Marine Trade Association and its Members, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

By THE COURT:

Staley,
Circuit Judge.

Dated:

April 30, 1964.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 324

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This petition seeks review of the same judgment and presents the same question as does the petition in *International Longshoremen's Association, Local 1242* v. *National Labor Relations Board*, No. 235, this Term. Petitioner in this case represents ship-cleaners, carpenters and maintenance men, who, like the clerks and checkers represented by the petitioner in No. 235, lost work opportunities when the Philadelphia Marine Trade Association unlawfully locked

out all longshoremen in July 1959. The Board found that, in the circumstances of this case, the loss of work opportunity by the clerks, checkers, shipcleaners, carpenters, and maintenance men did not constitute discrimination barred by the National Labor Relations Act. The court of appeals enforced the Board's order and rejected petitioner's claim—also made by the petitioner in No. 235—that the employees who were incidentally harmed by the employer's unfair labor practice were also entitled to relief. For the reasons set forth in our Brief in Opposition in No. 235,[1] this issue does not warrant review by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ELLIOTT MOORE,
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National Labor Relations Board.

August 1964.

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[1] A copy of that brief has been served on petitioner here.

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Supreme Court of the United States

October Term, 1964.

No. 324.

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 324.

LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION.

The Board, in an effort to distinguish the effect of the illegal lockout upon Local 1291 from that upon the other locals, states that: "On the factual situation before it, the Board could properly limit relief for the consequences of the association's ill-advised defensive measure to those employees who were primarily and directly affected by the association's conduct;" and that the Board "reasonably concluded that in the circumstances of this case the lockout of the longshoremen did not have the necessary and foreseeable consequence of discouraging union activity" by Local 1566, and that, therefore, it was not "inherently discriminatory" as to the latter (Brief, pages 6-7). These statements blindly refuse to recognize the obvious facts in this case.

The undisputed facts, *as found by the Trial Examiner,* demonstrate without doubt that the members of Local 1566 *were* primarily and directly affected by the lockout, and that the Association's illegal conduct *did have* the neces-

sary and foreseeable consequence of discouraging union activity by the members of this local, and *was* inherently discriminatory as to them. The Trial Examiner found that by the very nature of the work performed, *every* action which affected Local 1291 immediately and to the same extent affected Local 1566 (23a). The collective bargaining agreement provides that Local 1566 shore, support, lash, and strap all cargo *as and when*, and to the same extent, that Local 1291 loads the same. During unloading by Local 1291, the reverse procedure by 1566 takes place. Further, Local 1566 must erect grain feeders and cargo shifting boards, and similar devices, in conjunction with loading of certain bulk cargo by Local 1291. The foregoing requires the presence of Local 1566 men at the same time and place as Local 1291 must be present. Without Local 1566, Local 1291 would be immobilized. Any obstructions placed in the path of Local 1291 immediately obstruct Local 1566, and to the same extent.

The work of these locals is so intertwined that, in many aspects they have concurrent jurisdiction. This is specifically recognized in the collective bargaining agreement which provides for concurrent jurisdiction in flooring with dunnage and discharging same, loading ship's stores, and opening and covering hatches (G. C., Ex. 9, pp. 54-55, 68-69). Thus, if the Board felt that "it could properly limit relief . . . to those employees who were primarily and directly affected by the Association's conduct", it was forced by the undisputed facts to conclude that the relief granted to members of Local 1291 *must* be granted to 1566, as the Trial Examiner did conclude.

This obvious interrelation and interdependence of work requires the conclusion that the lockout of Local 1291 necessarily and foreseeably discriminated against Local 1566. This Court has repeatedly emphasized that the employer's illegal intent is found in the foreseeability of the consequences.* The natural foreseeability that refusal of

* *NLRB v. Erie Resistor Corp.*, 341 U. S. 810, 10 L. ed. 2d 308, 314-15 (1963).

work to Local 1291 must discriminate against and injure Local 1566 is a necessary conclusion from the practical, economic, historic and official interrelation and identities of the two locals. Realizing the total interdependence between these two locals the Associations threatened and executed the lockout with the obvious intent that Local 1566, as well as the International, would apply its own pressure on Local 1291 to give in to the Association's illegal demand. As this Court said in the *Erie Resistor* case, the employer's conduct "does speak for itself" (10 L. ed. 2 at 314-15).

The conclusions of the Trial Examiner were wholly required by the facts and the law in this case. The contrary decision by the Court below directly conflicts with the principles repeatedly announced by this Court, and should be reversed.

Respectfully submitted,

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